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No. 08-596

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JASON SCOTT WILSON,

*Petitioner,*

v.

WARDEN KAREN HOGSTEN, ET AL.,

*Respondents.*

*On Petition for a Writ of Certiorari*
*To the United States Court of Appeals*
*For the Third Circuit*

# REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Petitioner, a federal inmate, was placed in highly restrictive conditions of administrative detention for approximately ten months, from April 2005 until February 2006, seven of which were ostensibly in connection with a pending investigation of his possession of a single pornographic magazine. The government does not dispute that, had Petitioner been found to have possessed the magazine, he could have been subjected to disciplinary segregation for a maximum of fifteen days. After the investigation was completed, with no finding of any misconduct, Petitioner was kept in administrative segregation for ten more weeks. The government claims that this additional period was justified because Petitioner was "pending transfer" to another facility, but there is no support for that position in either the record or the applicable Bureau of Prisons ("BOP") regulations. Alleging that he was placed in administrative detention without receiving an initial detention order or hearings before a Segregation Review Official, both of which are procedural protections required by the relevant BOP regulation, Petitioner filed this suit claiming that his Fifth Amendment due process rights had been violated.

There can be no dispute that the circuits are deeply divided over the appropriate standard to

apply to such a claim. Since this Court held in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), that an inmate may have a liberty interest triggering procedural due process protections if a deprivation of rights conferred by the government results in an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," the lower courts have struggled to determine the "baseline" against which an inmate's conditions of confinement should be compared to determine whether that confinement was atypical. *See generally Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (recognizing circuit split on this issue). Two circuits have held that the general prison population is the appropriate baseline, with a third moving in this direction; four have interpreted *Sandin* so narrowly that a liberty interest can almost never be found; and five have been unable to articulate any consistent test. Although the government half-heartedly attempts to gloss over these divisions, it is obvious that this Court's guidance is necessary.

Despite the government's strained arguments to the contrary, the question presented is squarely raised here. The government's contention that this Court should decline review because Petitioner's confinement supposedly was not atypical under any baseline has no grounding in the record or in the law. The assertion that this case is not the proper vehicle

to resolve the question presented because the individual respondents may be entitled to qualified immunity is also flawed. If that position were correct, every similar case would be insulated from review because the circuit split renders the law in this area unclear, and this Court's ability to clarify an important constitutional question would be seriously circumscribed.

In short, this Court has recognized the circuit split, the courts of appeals themselves have asked for guidance, and such guidance is necessary to protect inmates' constitutional rights and ensure the uniform administration of federal prisons. Review is warranted.

## I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHEN AN INMATE IN ADMINISTRATIVE SEGREGATION MAY POSSESS A LIBERTY INTEREST REQUIRING PROCEDURAL DUE PROCESS.

As explained in the petition, the courts of appeals are deeply divided regarding their baseline of comparison for determining whether an inmate who has suffered a deprivation of rights has been subjected to an "atypical and significant hardship" that triggers a liberty interest. Pet. 14-21. Two courts of appeals – the Fourth and Ninth – have correctly interpreted *Sandin* as requiring the use of

the general prison population as the baseline for determining whether a liberty interest exists, and the Second Circuit has moved in this direction. *See, e.g., Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996); *see also Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000). Four other courts of appeals – the D.C., Third, Fifth, and Seventh – have, by contrast, interpreted *Sandin* narrowly (although each circuit's interpretation is somewhat different) so that a liberty interest is almost never found. *See, e.g., Hatch v. District of Columbia*, 184 F.3d 846, 858 (D.C. Cir. 1999); *Griffin v. Vaughn*, 112 F.3d 703, 706-09 (3d Cir. 1997); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997); *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008). The remaining circuits have not clearly articulated a baseline and instead use a case-by-case analysis. *See, e.g., Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005); *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008); *Williams v. Norris*, 277 Fed. Appx. 647, 648-49 (8th Cir. 2008); *Thomas v. Warner*, 237 Fed. Appx. 435, 438 (11th Cir. 2007).

The government attempts to gloss over these obvious divisions by dismissing the widely varying tests as mere "differing verbal formulations." Opp. 11. But this Court itself has recognized the split, observing in *Wilkinson* that, "[i]n *Sandin*'s wake the

Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223. Unable to truly dispute that the circuits are divided, the government is left with two main arguments as to why this Court should not address this issue — that the circuits have nevertheless reached consistent results and that Petitioner's due process claim would fail regardless which baseline is used to analyze it. Neither argument is persuasive.

First, in claiming that the circuits have reached relatively consistent results, the government categorizes the cases based on duration, concluding that the lower courts agree that a long detention in administrative segregation implicates a liberty interest, while what the government claims is a short detention does not. This simplistic analysis falls apart when the cases the government cites are examined. In a number of these cases, although duration of confinement was considered, the holdings were based on qualitative comparisons of the conditions of an inmate's confinement with those of other inmates. *See, e.g.*, *Tellier v. Fields*, 280 F.3d 69, 80, 83 (2d Cir. 2000) (affirming need for factual determination of "nature" of inmate's confinement); *Sealey v. Giltner*, 197 F.3d 578, 589 (2d Cir. 1999) (looking to both duration and conditions to determine

whether confinement in the special housing unit was "atypical"); *Beverati*, 120 F.3d at 503-04 (analyzing atypicality based on inmate affidavits regarding qualitative conditions of confinement). Moreover, the government's suggestion that the duration of an inmate's segregated confinement is an easily-applied litmus test for determining whether a liberty interest is triggered, Opp. 12, is belied by the fact that the lower courts themselves have asked this Court to clarify the law in this area. *See, e.g.*, *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997) (noting that because of the circuit split, the court faced "a number of unsettled questions about how to apply *Sandin* to this case"); *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997) (addressing the question of which baseline should be used and stating, "we would welcome clarification of the issue by the Court").[1]

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[1] The government goes so far as to suggest that the supposedly "consistent" results reached by the courts of appeals mean that there is "no urgent need to clarify [the law]." Opp. 12. As noted above, the courts of appeals themselves disagree with this assessment. Moreover, *Sandin* was decided fourteen years ago, and nothing indicates that percolation is leading to consensus; in fact, as can be seen from the cases cited by both parties, the opposite is true.

Second, the government claims that review is not warranted because Petitioner's confinement in administrative segregation supposedly was not atypical under any baseline. The government bases this erroneous argument on the following assertions: (1) the duration of Petitioner's confinement was shorter than those in cases where the courts of appeals found confinement to be "atypical;" (2) assignment to administrative segregation is an "ordinary incident of [prison] life;" and (3) the additional ten weeks Petitioner spent in administrative confinement after the investigation ended were not atypical because they were "pending transfer." Opp. 8-10. All of these arguments miss the mark, and the Government's contention that Petitioner's last ten weeks in confinement were "pending transfer" is utterly without support in the record.

As an initial matter, the government's focus on the duration of Petitioner's confinement as the driving factor in determining whether he has stated a liberty interest is based on a mischaracterization of both Petitioner's claim and the governing law. Petitioner's claimed liberty interest is based not only on the length of his segregated confinement but also on the highly restrictive conditions imposed and the fact that he spent an additional ten weeks in administrative segregation after any possible

justification for that confinement had ended, which certainly cannot be said to be typical.[2] Pet. 2-3. In addition, *Sandin* makes clear that factors other than duration must be considered in determining whether an inmate has a liberty interest. Although this Court ultimately held that the inmate in *Sandin* had not stated a liberty interest, in reaching that conclusion it compared the inmate's circumstances with those of inmates inside and outside restrictive confinement (including those in the general prison population). 515 U.S. at 486.

Contrary to the government's contention, had Petitioner's claim been analyzed under an appropriate baseline (instead of analyzed simply based on duration as was the case in the court below), it might well have turned out differently. Far from being a "fact-bound determination" that does

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[2] Although the lower courts stated that Petitioner was confined to administrative segregation for approximately ten weeks after the investigation ended, App. 4a, 26a, this is a misreading of the record. The investigation ended on November 17, 2005, and Petitioner was transferred on February 8, 2006. App. 25a-26a. He therefore remained in administrative segregation for almost twelve weeks (eighty-three days) without justification.

not warrant this Court's review, Opp. 11, the outcome of Petitioner's due process claim hinges directly on which baseline is used to analyze it. It is this purely legal question that is presented here. *See generally Sealey*, 197 F.3d at 586 ("The content of the *Sandin* standard of 'atypical and significant hardship' is an issue of law.").[3]

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[3] The government is also simply wrong in asserting that Petitioner's confinement in administrative segregation was too short to be considered "atypical" under any baseline. The government ignores cases where confinements in restrictive custody shorter than Petitioner's, and under similar conditions, were held to trigger liberty interests. *See, e.g.*, *Palmer v. Richards*, 364 F.3d 60, 67-68 (2d Cir. 2004) (finding detention of seventy-seven days could be atypical); *see also Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir. 2000) (noting that Second Circuit has found confinements of 125-288 days to be "relatively long" and potentially atypical). The government does attempt to distinguish one case in which a period of confinement similar to Petitioner's was found to be atypical, *Colon*, 215 F.3d 227 (detention of 305 days), by arguing that it involved disciplinary segregation in a state prison. Opp. 9. *Sandin*, however, looked to the conditions of the inmate's incarceration, not to the label of "administrative" vs. "disciplinary" segregation, to decide whether a liberty interest existed. In addition, that *Colon* involved a state inmate is of no moment because the same analysis applies to federal and state inmates in this area. *See, e.g.*, *Richardson v. Joslin*, 501 F.3d 415 (5th Cir. 2007); *Hill v.*

Next, the government posits that Petitioner's confinement in administrative segregation was not atypical because "assignment to administrative detention is an ordinary incident of life in the federal prison system and can occur for any number of different reasons," citing the governing BOP regulation. Opp. 8. The mere existence of a regulation authorizing the imposition of administrative detention in certain circumstances, however, does not mean that such detention will never work an "atypical and significant hardship." If the government were correct, prison officials could indiscriminately place inmates in restricted custody under the guise of a reason specified in the regulation without fear of review.

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*Fleming*, 173 Fed. Appx. 664 (10th Cir. 2006); *Tellier*, 280 F.3d 69; *Crowder v. True*, 74 F.3d 812 (7th Cir. 1996). Finally, the government also attempts to distinguish *Colon* on the ground that, "unlike here, the court emphasized the lack of any indication that such confinement was typically endured by other prisoners in the ordinary course of prison administration." Opp. 9 (internal quotation marks omitted). Remarkably, the government has reversed the *Colon* court' s placement of this burden on the *state*, which, like the government here, failed to offer such proof. *Colon*, 215 F.3d at 231.

Finally, the government attempts to insulate this case from review by claiming that Petitioner's final ten weeks in administrative segregation were not atypical because they were pending his transfer to another institution. Opp. 9-10. This argument is specious at best. ***Nothing*** in the record indicates that there was any justification for Petitioner's continued segregated confinement after the investigation ended. To the contrary, even the District Court found "that there was a continuing legitimate need for the Plaintiff's SHU confinement until November, 2005," App. 25a, not for the ensuing ten weeks.

The mere fact that Petitioner was eventually transferred to another facility in February 2006 does not, as the government apparently believes, give rise to an inference that he was "pending transfer" from the time the investigation ended. In addition, the regulation the government cites for the idea that continued assignment to administrative detention pending transfer is appropriate concerns only reassignments from disciplinary detention, not administrative detention, where Petitioner was held. *See* 28 C.F.R. § 541.22(a)(6)(i). Common sense dictates that confinement to administrative segregation without justification cannot be typical of ordinary prison life.

In short, the government's attempts to cast Petitioner's confinement as typical and to gloss over

the circuit split have no basis in the facts or the law. There is no doubt that the question presented warrants review. This issue has seriously divided the courts of appeals. The decision of the court below and the decisions of the D.C., Fifth, and Seventh Circuits are in tension with this Court's decisions in *Sandin* and *Wilkinson*. Pet. 22-24. The confused state of the law has resulted in an untenable situation in which the constitutional rights of federal inmates differ depending on the circuit in which they are incarcerated. Review is warranted.

## II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

In the face of this obvious need for clarity, the government falls back on the position that this case is not the proper vehicle to address the question presented because, even if Petitioner could establish a protected liberty interest, he is not entitled to any relief. Opp. 12-15. The government first argues that Petitioner's injunctive relief claim is moot because he is due to be released in May 2009. Opp. 13. Under this logic, however, many cases would similarly be insulated from review simply because of the time necessary to reach this Court. Even if this argument were correct, Petitioner's claim for monetary relief is not moot.

In recognition of this, the government next

argues that this Court should deny review because Petitioner has no basis for monetary relief, claiming that the individual respondents are entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194 (2001),[4] because the law in this area is not clearly established.[5] Opp. 13. This position, if accepted, would prevent review in all cases where an inmate (or other person proceeding under *Bivens* or § 1983) with only a damages claim presented a

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[4] This Court recently held in *Pearson v. Callahan*, 172 L. Ed. 2d 565 (U.S. 2009), that the *Saucier* test for qualified immunity is no longer mandatory.

[5] The government claims both that the circuit split renders this area of the law unclear and that it also was not clearly established that Petitioner was entitled to more process than he received. This latter point is simply incorrect. Under the governing BOP regulations, Petitioner was entitled to an administrative detention order within 24 hours of his placement in administrative detention, 28 C.F.R. § 541.22(b), and due process mandates that an inmate placed in administrative segregation receive "some notice of the charges against him." *Hewitt v. Helms*, 459 U.S. 460, 476 (1985). The government does not dispute that Petitioner never received such an order or any notice. Moreover, due process requires, at a minimum, "an informal, nonadversary review of the information supporting [the inmate]'s administrative confinement," *id.* at 472, which also was never provided.

legitimate constitutional argument in a developing area of the law. That cannot be correct. If it were, such plaintiffs would be left without any recourse, and this Court's ability to clarify important constitutional questions would be severely circumscribed.

This Court recognized as much in *Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998), stating that, in appropriate cases, qualified immunity issues should be set aside in favor of clarifying important constitutional questions. The Court noted that "if the policy of [constitutional] avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *Id.* Cases involving the question presented that do not also involve a potential qualified immunity defense are unlikely to come before this Court. Qualified immunity should not be a barrier to review.

## CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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